Essay

American Fiction: Overturning the Doctrine of Immigration Entry Fiction as Established in *Shaughnessy v. Mezei*

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> It is as though the walls of Historic Fort Snelling exist not only in physical form but in the minds of people. If nothing else at all happens these are the walls that need to be torn down. It is time we take down all the forts, literally and metaphorically.
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> — Waziyatawin, writing on Fort Snelling, Minnesota[1]

INTRODUCTION

"Immigration law fictions range from nebulous abstractions to outright distortions and misrepresentations. They are often used to achieve ends that would be unthinkable in other areas of American law and popular belief."[2]

In 1886, the Supreme Court decided a case called *Yick Wo v. Hopkins*,[3] which held that any person physically within the United States' territory would enjoy the protections of the Fourteenth Amendment, regardless of their immigration or citizenship status. In a racist and nationalistic reaction, this decision gave rise to the continued usage of a legal concept called "entry fiction," where people who may remain physically within the

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1. Jan Dalsin, *The Past Is Never Dead at Fort Snelling*, MINNESOTAHISTORY.NET (Feb. 18, 2011), https://www.minnesotahistory.net/wptest/?p=3198 [https://perma.cc/B8RS-CDHL] (quoting Waziyatawin).

2. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 53 (1989).

3. 118 U.S. 356 (1886).

country may still be detained as though they have not entered, and as such are not entitled to constitutional protection. Entry fiction applies to many people who are detained in immigration detention centers that are located well within the confines of American borders.

Circuits are currently split over the adoption of "entry fiction" as it applies to constitutional prohibitions against unreasonable searches and seizures, as well as the attachment of constitutional due process rights to non-citizens who have physically crossed the country's borders. This Essay will propose that the Supreme Court should resolve the split and move away from the doctrine of entry fiction by overturning *Shaughnessy v. Mezei*,[4] such that any physical intrusion into the country is sufficient to bestow constitutional rights, even if a person is an unadmitted, unprocessed non-citizen. Such a decision would enable immigration legal organizations to render greater protections to the people that they serve and would put an end to a humanitarian crisis that is currently unfolding by the mass unconstitutional and extrajudicial detainment of people in immigration detention centers.

I. THE HISTORY AND DEVELOPMENT OF THE "ENTRY FICTION" LEGAL DOCTRINE

In some ways, the Nineteenth Century Supreme Court was more progressive on immigration than today's Court. In 1885, Mr. Lee Yick petitioned the Supreme Court of California for a writ of habeas corpus, alleging that he was illegally deprived of his personal liberty by the defendant, the sheriff of the city and county of San Francisco.[5] Mr. Yick was a citizen of China and had come to the United States in 1861, whereupon he opened a laundry business called Yick Wo.[6] He ran the business successfully for over twenty-two years and maintained all the proper licenses and inspections required by the city and the fire marshals.[7] In 1880, the City Board of Supervisors passed an ordinance prohibiting the operation of laundries in wooden buildings without a permit.[8] The ordinance provided a mechanism to

4. 345 U.S. 206 (1953).
5. Yick Wo v. Hopkins, 118 U.S. 356, 365 (1886).
6. *Id.*
7. *Id.*
8. *Id.*

petition the City for a permit, which Mr. Yick applied for.[9] At the time, there were 320 wooden-building laundries in the City, of which 240 were owned by Chinese citizens.[10] Two hundred of the Chinese laundry owners applied for a permit, but only one permit was granted.[11] Concurrently, seventy-nine out of eighty non-Chinese laundry owners were granted a permit.[12] Although Mr. Yick's permit was denied, he continued to operate the laundry, and was subsequently fined ten dollars and then jailed for refusing to pay it, at which point he filed his habeas petition.[13]

The lower court wrote that "the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted."[14] The Supreme Court was evidently persuaded by this statement. The majority wrote plainly that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens."[15] It also set the stage for the concept of the disparate impact interpretation of the Fourteenth Amendment that would become important in subsequent Equal Protection Clause case law: "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand," it is an infringement on the Fourteenth Amendment.[16] In essence, facially race-neutral laws that are administered prejudicially may violate the Equal Protection Clause.

In the same year as *Yick Wo*, the Court took up another case, *Wong Wing v. United States*,[17] that would ultimately extend the protections of the Fifth and Sixth Amendments to non-citizens. At the time, the Chinese Exclusion Act (as updated by the Geary Act) severely constrained citizenship pathways and lawful status for "any person of Chinese descent."[18] Chinese people were required to carry "residence certificates" to prove that they

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 369.
16. *Id.* at 373–74.
17. 163 U.S. 228 (1896).
18. *Id.* at 233 (citing the Geary Act, Pub. L. No. 52-60 (1892), which after passage in 1892 extended the Chinese Exclusion Act for an additional ten years).

entered the country legally, at the risk of deportation and imprisonment.[19] Mr. Wong Wing and three other Chinese men were arrested in Michigan for their "unlawful presence" in the country and were sentenced—without a trial—to sixty days' hard labor in a Detroit jail and subsequent deportation.[20] Upon sentencing, the four men filed habeas petitions on two important grounds: 1) that the Act was in violation of the Fifth Amendment by holding them to answer for a crime without presentment to a grand jury and deprived of liberty without due process of law; and 2) that under the Sixth Amendment, in a criminal prosecution, they had the right to a fair and impartial jury.[21]

The Court ruled in favor of the four men by relying on the decision in *Yick Wo*. Because the Fourteenth Amendment applied to non-citizens, the Fifth and Sixth Amendments did as well.[22] The Court even went a step beyond what the petitioners alleged in their habeas arguments and held that not only could non-citizens not be sentenced to imprisonment without a trial, but they also had a right against confiscation of their personal property under the Fifth Amendment.[23]

Since 1886, the Supreme Court has largely honored the concept that non-citizens' physical presence on American territory is sufficient to grant them some constitutional protections.[24] The 2001 *Zadvydas v. Davis* decision was explicit that "once an

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19. *Id.* at 231.

20. *Id.* at 239.

21. *Id.* at 241.

22. *Id.* at 237.

23. *Id.*

24. *See*, *e.g.*, Demore v. Hyung Joon Kim, 538 U.S. 510, 543 (2003) ("It has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term" and thus entitled to the protections of the Fourteenth Amendment.); Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects [aliens] from deprivation of life, liberty, or property without due process of law . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("The power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'").

alien[25] enters the country, the legal circumstance changes" because the Constitution provides due process protections to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[26] However, this bright-line rule has one exception: the "entry fiction" doctrine developed by the Court in *Shaughnessy v. United States ex rel. Mezei*.[27] *Mezei* held that, whereas "aliens who have once passed through our gates, even illegally," possess certain constitutional rights, "an alien on the threshold of initial entry stands on a different footing."[28] Under the limited carve-out created by the entry fiction, a non-citizen's arrival at a port of entry—which is geographically within the United States—does not qualify as entering the country. As held in *Mezei*, "harborage at Ellis Island is not an entry into the United States."[29] For due process purposes, a non-citizen at a port of entry "is treated as if stopped at the border."[30]

Five years after *Mezei*, in 1959, the Court went a step further and broadened the entry fiction doctrine to apply even when the person is "paroled" into the country pending determination of admissibility.[31] Therefore, "although a port of entry may be physically within the United States, one who has not completely passed through it has no constitutionally protected liberty interest in entering the country."[32] In practice, "a person effects an entry if they cross into the territory of the United States *either* via inspection and admission by an immigration official *or* by intentionally evading inspection while remaining free from restraint."[33] This is true "even if Immigration and Customs Enforcement ('ICE') officials transport them deep into the interior and lock them away in detention centers, even for years."[34]

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25. Most immigration jurisprudence refers to non-citizens as "aliens." This Essay will not use that terminology unless it is a direct quote.

26. 533 U.S. 678, 693 (2001).

27. 345 U.S. 206 (1953).

28. *Id.* at 212.

29. *Id.* at 213.

30. *Id.* at 215.

31. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

32. Brief for Scholars of Immigration Law as Amici Curiae Supporting Petitioners at 3, Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016).

33. Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 571–72 (2021) (citing *Z-*, 20 I. & N. Dec. 707, 707–08 (B.I.A. 1993)) (emphasis in original).

34. *Id.* at 572–73.

Entry fiction was initially proposed as a humanitarian option to a rapid growth spurt of immigration in the 1800s. At the time, most immigrants approached the continental United States by boat, but the boats were so dangerous, and there were so many people on board, that immigration officials struggled to process everyone timely.[35] In response, Congress passed a law that "allowed such aliens to be properly housed, fed, and cared for" in facilities on land so that they didn't need to languish onboard the boats.[36] Such a facility would not be considered a "landing during the pendency" of the immigration proceeding.[37] It largely took until Justice Jackson's dissent in *Mezei* sixty years later to acknowledge that keeping someone in a detention center without due process—in that case, on Ellis Island—was more imprisonment than refuge. "Realistically, this man [Mezei] is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority."[38]

Unfortunately, although *Mezei* arose from humanitarian principles, it has been co-opted to deny people the full protections of the Constitution by labeling them as "unadmitted." As a result, a patchwork of rights applies across the country. Some jurisdictions provide the full muster of the Fourth, Fifth, and Sixth Amendments as soon as a person has affected physical entry across the border, while others require a much stronger connection between the non-citizen and the country before any rights are afforded.

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35. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 951 (1995).

36. *See* Act of Mar. 3, 1891, Pub. L. No. 51-551, § 8; *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892) ("Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of habeas corpus, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.").

37. *See* Act of Mar. 3, 1891, Pub. L. No. 51-551, § 8

38. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

II. THE CURRENT CIRCUIT SPLIT HAS ENABLED THESE HARMS TO PERPETUATE

The Court of Appeals for the Fifth Circuit has acknowledged an expansive right to constitutional protections. In 2001, a forty-nine-year-old woman and Mexican citizen named Maria Martinez-Agüero was crossing the U.S.–Mexico border to accompany her aunt to the Social Security office in El Paso, Texas.[39] She had taken this journey about once a month for several years, each time using a paper border-crossing card that granted her legal entry as a visitor.[40] Earlier that year, Immigration and Naturalization Services (INS) had decided to issue biometric, machine-readable cards for increased security, which would replace the paper cards.[41] She had gone to the U.S. consulate and asked them how she could cross the border while she awaited her new biometric card in the mail.[42] They informed her that they could stamp her paper card as proof that she was allowed to travel in the interim.[43] They stamped her card and she continued to use it successfully for the next three months.[44]

On a fateful day in October 2001, Martinez-Agüero was crossing the border on a bus with the stamped paper card as she had been doing.[45] INS stopped the bus within the territorial United States but just short of the port of entry.[46] A Border Patrol agent boarded the bus and saw that Martinez-Agüero still had an old paper card.[47] He told her that her visa was invalid and she could not enter, and forced her to disembark the bus.[48] Martinez-Agüero made a sarcastic remark to her aunt about his behavior, which threw him into a fit of rage.[49] He "grabbed [her] arms, twisted them behind [her] back, pushed her into a concrete barrier, which hit [her] in the stomach . . . [and] then started

39. Martinez-Agüero v. González, 459 F.3d 618, 620 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 621.

49. *Id.*

kicking [her] with his knees in [her] lower back."[50] She was then taken into an office and tied to a chair, at which point she suffered a seizure.[51] Since that day, Martinez-Agüero "claims she now suffers from recurrent seizures (before the beating she had not suffered a seizure for seventeen years), memory problems, back injuries, and continual pain."[52] Martinez-Agüero brought suit against the agent for, among other claims, use of excessive force in violation of the Fourth and Fifth Amendments.[53]

Under *Wong Wing*, the law would have been clear that the protections of the Constitution—including the Fourth and Fifth Amendments—would apply to Martinez-Agüero as strongly as if she had been an American citizen.[54] However, the facts in *Martinez-Agüero* are distinguished from those in *Wong Wing* in one important way: she had not fully crossed the border and had not been processed by a Border Patrol agent, although she was within the territorial boundaries of the country. Therefore, the Respondent claimed that she was subject to the entry fiction doctrine as established in *Mezei* and enjoyed no constitutional protections.[55] On those grounds, Respondent asked that Martinez-Agüero's suit be dismissed because she had no constitutional rights that the Respondent was obligated to uphold.[56] Surprisingly, the Fifth Circuit disagreed.[57]

In so doing, the Fifth Circuit relied on a Supreme Court case called *United States v. Verdugo-Urquidez*.[58] That case considered the search and seizure of a criminal defendant's home in Mexico who had been arrested for drug dealing in the United States.[59] The Court held that a non-citizen enjoyed no extraterritorial protection from the Fourth Amendment for a search and

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments . . . .").

55. *Martinez-Agüero*, 459 F.3d at 621.

56. *Id.*

57. *Id.* at 625.

58. 494 U.S. 259 (1990).

59. *Id.* at 274–75.

seizure that occurred in a different country.[60] The Court did, however, draw one exception—if the non-citizen has a "previous significant voluntary connection with the United States," then he is considered one of the "People" mentioned in and protected by the Constitution.[61]

The Fifth Circuit analyzed Martinez-Agüero's claims under the framework established by *Verdugo-Urquidez*. It found that she had "substantial connections" to the country because she was "voluntarily" present and "presumably had accepted some societal obligations."[62] Those "substantial connections" were sufficient to confer her Fourth Amendment rights.[63] With this holding, the Fifth Circuit effectively sidestepped the entry fiction doctrine, at least for non-citizens with "substantial connections" to the United States. In the court's words, "[t]he 'entry fiction' . . . does not limit the right of excludable aliens detained within United States territory to humane treatment."[64]

Unfortunately, the Fifth Circuit is largely an outlier in liberally construing the protections of the Constitution. The Third Circuit "call[s] into serious question the proposition that even the slightest entrance into this country triggers constitutional protections that are otherwise unavailable to the alien outside its borders."[65] The Third Circuit analyzed *Verdugo-Urquidez*, as well as other Supreme Court case law from the 1950s, to conclude that a non-citizen could not invoke the Suspension Clause protecting the privilege of the writ of habeas corpus, "despite their [petitioners'] having effected a brief entrance into the country prior to being apprehended for removal."[66] This seems to be a harried conclusion given that the Third Circuit does not even attempt to apply the "substantial connection" test from *Verdugo-Urquidez* to the petitioners at issue in *Castro v. U.S. Department of Homeland Security*.[67] In *Castro*, all petitioners had fully crossed the border and traveled about one mile into the

60. *Id.*

61. *Id.* at 261.

62. *Martinez-Agüero*, 459 F.3d at 625 (citing *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)).

63. *Id.*

64. *Id.* at 623.

65. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 448 (3d Cir. 2016).

66. *Id.* at 424.

67. *See generally id.*

territorial United States.[68] Under a *Verdugo-Urquidez* framework, being so deep into the territorial United States likely may have been sufficient to confer a "substantial connection" between the petitioners and the country.[69] Similarly, the Third Circuit's holding does not square with *Martinez-Agüero*, who had not even made it across the border but still had constitutional protections due in part to her "voluntary" presence in the country.[70]

As it stands, the current circuit splits mean that non-citizens are left with dramatically stronger or weaker legal protections depending on where they happen to cross the border—and in which Circuit a potential lawsuit would be brought. Not only is this injurious to their personal health, safety, and legal status, but it also means that the enforcement of immigration policies across the country is left fragmented and inefficient. The Supreme Court taking up the issue of entry fiction would resolve these inter-jurisdictional discrepancies.

III. ENTRY FICTION DELETERIOUSLY AFFECTS NON-CITIZENS' LEGAL PROCEEDINGS WITHIN THE UNITED STATES

Crossing the border into the territorial United States does not automatically confer constitutional protections. This means that many of the constitutional and evidentiary safeguards that a citizen might employ in tribunals and court proceedings may not apply to non-citizens operating within the system. Within the criminal context, non-citizens largely are not able to exclude evidence under the Fourth Amendment as unlawfully searched and seized, particularly if the search occurred outside of the territorial United States—despite being entered into evidence in an American court of law. This same lack of protection is particularly pronounced in immigration proceedings, where it is difficult—if not impossible—to suppress certain statements and other unconstitutional government actions that may be used against the respondent in effecting their deportation.

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68. *Id.* at 427–28.

69. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (denying Fourth Amendment protections to a search that occurred outside of the territorial United States because there was no "significant connection" between the defendant and the country).

70. *Martinez-Agüero*, 459 F.3d at 625 (citing *Verdugo-Urquidez*, 494 U.S. at 273).

A. ENTRY FICTION'S IMPACTS ON IMMIGRATION PROCEEDINGS

The enforcement of constitutional protections varies widely across jurisdictions. That is no better exemplified than in the case *Almeida-Amaral v. Gonzales*.[71] In 2003, Mr. Almeida-Amaral was stopped by a Border Patrol agent about eighty miles from the border while standing outside a gas station in southwestern Texas.[72] Almeida-Amaral gave a statement to the agent acknowledging that he was a Brazilian citizen but not an American one.[73] That statement established the basis to consider him "illegally in the United States" and subjected him to immediate immigration enforcement proceedings.[74] Before he was brought before an immigration judge (IJ),[75] he made a motion to suppress his statement on the ground that his arrest was an illegal seizure without articulable suspicion in violation of the Fourth Amendment.[76]

In *Immigration & Naturalization Services v. Lopez-Mendoza*, the Supreme Court held that a Fourth Amendment violation does not, by itself, justify suppression of evidence in the course of a civil deportation proceeding: "Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end."[77] There was one exception to that holding, which was that it did not necessarily pertain to circumstances involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[78]

The Second Circuit in *Almeida-Amaral v. Gonzales* took that to mean that "exclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an egregious violation that was fundamentally unfair had

71. 461 F.3d 231 (2d Cir. 2006).

72. *Id.* at 232–33.

73. *Id.*

74. *Id.* at 233.

75. Almeida-Amaral was initially served with a warrant to go before an IJ in Chicago; he successfully moved for a change of venue to New York. *Id.* That is why this case was decided in the Second Circuit and not the Fifth, where he was originally detained, or the Seventh, where Chicago is situated.

76. *Id.*

77. 468 U.S. 1032, 1046 (1984).

78. *Id.* at 1050–51.

occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."[79] In this case, the Second Circuit felt that the circumstances of his arrest were not egregious or unfair, and that a separate affidavit from Almeida-Amaral's mother "raise[d no] doubts about the veracity of the evidence obtained as a result of [his] seizure."[80] Therefore, his statement was not suppressible under the Fourth Amendment because it did not meet either prong of the *Lopez-Mendoza* test. The court ruled that his statement could be used against him during enforcement proceedings.[81]

This positions Almeida-Amaral, and many people similarly situated to him, in a catch-22.[82] The Second Circuit held that there was a high hurdle for the petitioner to overcome in order to make a showing of a constitutional violation—the unreasonable search and seizure would have to be "egregious."[83] If, and only if, he could make that showing would he then be afforded the protections of the Constitution, including the Fourth Amendment, which he could employ to protect himself in subsequent enforcement proceedings.

Almeida-Amaral would have been in a significantly different legal position if he had been summoned before an IJ in the Fifth Circuit, where Texas is located. There, he would have been subjected to the *Martinez-Agüero* framework, and his Fourth Amendment rights would have attached as soon as he crossed the border into the territorial United States.[84] If he could establish his "significant voluntary connection" to the U.S., then he would have been afforded all the same "humane treatment" and constitutional protections as any American citizen.[85] He would likely have been able to suppress his statement without making

79. *Almeida-Amaral*, 461 F.3d at 235.

80. *Id.*

81. *Id.*

82. A "catch-22" is defined as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/catch-22#:~:text=1,rule%20that%20denies%20a%20solution [https://perma.cc/7MHQ-6EKJ].

83. *Almeida-Amaral*, 461 F.3d at 235.

84. Martinez-Agüero v. González, 459 F.3d 618, 624 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006) ("[W]e have explicitly held[] that the Fourth Amendment applies to aliens.").

85. *Id.* at 623.

a showing of an "egregious" violation of the Fourth Amendment. Because his initial statement to the officer that he was not an American citizen was instrumental in determining whether he was legally in the country, suppression of that statement might have halted or changed the terms of his pending removal.

B. ENTRY FICTION'S IMPACTS ON CRIMINAL PROCEEDINGS

The interactions between criminal and immigration proceedings in America are sufficiently complicated to warrant a specific term of art and designated legal practice area: "crimmigration."[86] In *Zadvydas*, a seminal case applying the Due Process Clause to "aliens who were admitted to the United States but subsequently ordered removed" due to committing a crime, the Supreme Court held that *indefinitely* holding an "*admitted* alien" ran afoul of the Fifth Amendment.[87] However, the Supreme Court has not yet taken up the issue of whether non-admitted people existing in the entry fiction limbo under *Mezei* are entitled to those same constitutional protections.

The Eighth Circuit took up this question and held that "aliens who have not effected an entry into the United States" are not deserving of *Zadvydas*'s Fifth Amendment protections in the vast majority of cases.[88] One example is the case *Borrero v. Aljets*. Borrero was a Cuban citizen who arrived in the U.S. in 1980 during the Mariel boatlift.[89] Rather than hold him indefinitely in a detention center pending immigration proceedings,

86. Raul A. Reyes, *How Immigration Policies Became 'Crimmigration'—and the Racial Politics Behind It*, NBC NEWS (Sept. 3, 2021), https://www.nbcnews.com/news/latino/immigration-policy-became-crimmigration-racial-politics-rcna1818 [https://perma.cc/L7G3-CTDU].

87. Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (emphasis added).

88. Borrero v. Aljets, 325 F.3d 1003, 1007, 1008 (8th Cir. 2003) (citing Wang v. Reno, 81 F.3d 808, 813 (9th Cir. 1996) (providing an example where an unadmitted person was entitled to Fifth Amendment protection against being forced to give testimony that would lead to his "near certain execution" upon return to China after deportation)).

89. *Id.* at 1005. The Mariel boatlift was a mass emigration of Cuban asylum seekers to the United States in 1980. *Mariel Boatlift of 1980*, IMMIG. HIST. (2019), https://immigrationhistory.org/item/mariel-boatlift [https://perma.cc/L6LB-5A7L]. The INS applied specific parole review procedures for detained Mariel Cubans that were different from those of other detainees. 8 C.F.R. § 212.12.

the INS paroled him into general society. [90] During his INS parole, he was convicted of several crimes, including cocaine possession and simple battery.[91] After serving his time for the crimes in a state prison, he was sent back into INS's custody.[92] The Commissioner of INS reviewed Borrero's case to determine whether he would be eligible for parole once again.[93] Relying on the Supreme Court's holding in *Zadvydas*, the Commissioner found that Borrero was eligible for parole because he could not be held indefinitely and there was little likelihood that he would be "removed from the United States in the reasonably foreseeable future."[94] In other words, he would have been stuck in INS custody for quite some time because Cuba didn't want him back. The government appealed the Commissioner's grant of his release, arguing that it had "statutory authority to detain inadmissible aliens, indefinitely if necessary, pending deportation."[95] Borrero argued that his release should be upheld because he was protected against indefinite detention under the Due Process Clause of the Fifth Amendment.[96]

The Eighth Circuit denied Borrero's claims that he was entitled to constitutional protections by relying on *Mezei*, which held that "whatever process Congress has authorized will satisfy the Constitution with respect to an alien requesting admission."[97] In Borrero's case, as a Cuban who arrived during the Mariel boatlift, the relevant statute allowed for indefinite post-removal detention if, for whatever reason, a ninety-day removal period provided by the statute was not possible and he could not be deported.[98] The Eighth Circuit went so far as to repudiate the Court in *Wong Wing* by saying that although that case "may support extending certain constitutional protections to inadmissible aliens accused of crimes . . . [it] do[es] not call into question the power of the government to detain an alien who is stopped at the

90. *Borrero*, 325 F.3d at 1008. Parole is not considered admission into the United States. 8 U.S.C. §§ 1101(a)(13)(A)–(B), 1182(d)(5)(A) (1995).

91. *Borrero*, 325 F.3d at 1005.

92. *Id.*

93. *Id.*

94. *Id.* (citing Zadvydas v. Davis, 533 U.S. 678 (2001))

95. *Id.* at 1005.

96. *Id.* at 1007.

97. *Id.*

98. *Id.* at 1006 (citing 8 U.S.C. §§ 1231(a)(1)–(6)).

border."[99] Borrero was considered stopped at the border under the entry fiction doctrine because he was still under custody of INS, so he was not entitled to protection by the Fifth Amendment.

Since *Borrero v. Aliets* came down in 2003, both the courts and the government have begun to recognize that non-admitted people may still be entitled to *some* Fifth Amendment protections, but they may be weaker than the protections afforded to admitted people. "[E]veryone seems to agree that, under the Due Process Clause, neither group of aliens [admitted or non-admitted] can be detained indefinitely (at least without some kind of showing that they are likely to flee or harm the community)."[100]

In deciding whether a person's detention would violate the Fifth Amendment's Due Process Clause, the courts apply the same set of reasonableness factors for both admitted and non-admitted people (which could be construed as a tacit admission that the strength of Fifth Amendment protections are the same for both groups).[101] These factors include "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal."[102]

Jamal A. v. Whitaker is instructive in demonstrating how the interplay between criminal charges may later affect immigration proceedings. Jamal was a Somali citizen who was

99. *Id.* at 1008.

100. Jamal A. v. Whitaker, 358 F. Supp. 3d 853, 858 (D. Minn. 2019); *see also* Wang v. Reno, 81 F.3d 808, 813 (9th Cir. 1996) (providing an example where an unadmitted person was entitled to Fifth Amendment protection against being forced to give testimony that would lead to his "near certain execution" upon return to China after deportation).

101. *Jamal A.*, 358 F. Supp. 3d at 858; *see*, *e.g.*, *Brissett v. Decker*, 324 F. Supp. 3d 444 (S.D.N.Y. 2018) (applying the reasonableness factors used in the context of 8 U.S.C.S. § 1226(c) (admitted aliens statute) to detention under § 1225(b)(2)(A) (non-admitted aliens statute)).

102. *Jamal A.*, 358 F. Supp. at 858–59. One possible explanation for why Borerro could be held indefinitely, without any protection from the Fifth Amendment, is that Cuba didn't want him back so he could not be properly deported from the country. Basically, Borrero would fail the sixth prong ("the likelihood that the removal proceedings will result" in deportation). However, for most non-citizens that is not the case, so holding them indefinitely would be more difficult to rationalize under the Due Process reasonableness test. Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003).

granted asylum and status in the U.S. as a "lawful permanent resident" (LPR).[103] At that point in time, he was considered "admitted" and therefore outside the scope of the entry fiction doctrine. However, after several years in the U.S., he was convicted of wire fraud and spent eight months in state prison.[104] Upon release, he fled to Canada, which eventually forced him back to the United States.[105] He was detained at the border pending removal proceedings.[106] Unfortunately, upon attempting to recross the border, Jamal was ensnared in the web of entry fiction: "LPRs such as Jamal who commit crimes of moral turpitude before leaving the United States are treated as arriving aliens when they attempt to reenter."[107] He was no longer considered "admitted" and now his constitutional protections hung in the balance. Luckily for Jamal, the district court applied the aforementioned Due Process reasonableness factors in his favor and he was granted the opportunity for parole.[108] However, because of the intense fact-specific inquiries required by those factors, not all non-citizens may be so fortunate.

As recently as 2018, the Supreme Court acknowledged in *Jennings v. Rodriguez* that it would designate to the lower courts the determination of whether detention statutes for admitted and non-admitted people could be in violation of the Constitution.[109] In that case, a class action set of plaintiffs brought a case alleging that detaining non-citizens for more than six months without a bond hearing was in violation of federal law.[110] "The class included arriving noncitizens detained under 8 U.S.C. § 1225(b)—including those subject to entry fiction—and noncitizens detained under 8 U.S.C. § 1226(c), which prohibited release of persons with certain criminal and security-related grounds for removal."[111] "The Court instead interpreted § 1225(b) and § 1226(c) to have no limits on the length of detention and

103. *Jamal A.*, 358 F. Supp. at 856–57.

104. *Id.* at 857.

105. *Id.*

106. *Id.*

107. *Id.* (citing 8 U.S.C.S. § 1101(a)(13)(C)(v)).

108. *Id.* at 860–61.

109. Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018).

110. *Id.* at 830.

111. Lee, *supra* note 33, at 606 (citing Rodriguez v. Robbins, 804 F.3d 1060, 1082–83 (9th Cir. 2015), *rev'd sub nom.*, Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018)).

remanded to the Ninth Circuit to determine whether the statutes (thus construed) violate the Constitution."[112] Justice Breyer pointed out in his dissent that the United States has a long history of granting the right to a timely bail hearing under the Fifth and Eighth Amendments.[113] He felt that it was nonsensical that the Court would not rule on its application to non-citizens trapped within entry fiction limbo and would instead punt the issue by remanding it to the lower court to decide.[114]

Moreover, these Fifth Amendment protections as applied to detention are extremely limited compared to the full scope of the Constitution. As with Almeida-Amaral and Martinez-Agüero, the circuit split means that it is still unclear what other protections non-admitted people may invoke.

C. ENTRY FICTION'S IMPACTS ON THE COMMUNITY

Immigration attorneys at the Minnesota Immigrant Law Center encounter the issue of entry fiction every single day with almost all of their clients.[115] Anyone who is at one point unlawfully present in the country could face a variety of devastating downstream consequences. "Unlawful presence" in the country is defined as anyone who has not been "admitted or paroled."[116] Section 212(a)(9)(C) of the Immigration & Nationality Act creates a permanent bar to reentry to the United States "if you reenter or try to reenter the United States without being admitted or paroled after having accrued more than one year of unlawful presence in the aggregate during one or more stays."[117] In essence, being caught in the limbo of entry fiction could foreclose future opportunities and paths to naturalization or citizenship. Those issues are only exacerbated by any potential criminal involvement, as demonstrated by the *Jamal A.* case.[118]

One reason why this issue is so difficult for immigration attorneys to address is because entry fiction, by its very nature, ensnares someone upon physical arrival at or across the

112. *Id.* at 607 (citing *Rodriguez*, 804 F.3d at 1082).

113. *Jennings*, 138 S. Ct. at 864–66 (Breyer, J., dissenting).

114. *Id.* (Breyer, J., dissenting).

115. Interview with Robyn Meyer-Thompson, Supervising Staff Att'y, Immig. L. Ctr. of Minn. (Nov. 6, 2023) (notes on file with author).

116. 8 U.S.C. § 1182 (2024).

117. INA § 212(a)(9)(C).

118. *See supra* notes 103–08 and accompanying text.

border.[119] Yet at the same time, the current immigration system makes it nearly impossible for non-citizens to effect legal entry with visas because of extreme backlogs. For example, U-visas are a type of visa that are "set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity."[120] While on paper that seems like a helpful designation, there are only 10,000 such visas issued per year in the country, for which many thousands more people could qualify.[121] In some cases, U-visas could take more than fifteen years to issue.[122]

The easiest way to avoid the continuing complexities of the overlapping doctrine of entry fiction and immigration would be to explicitly overrule *Mezei*. "A carefully worded Supreme Court decision that does not blur the distinction between 'entry' and 'admission' would go far to alleviate the uncertainty that had developed in the case law and would provide guidance to lower courts faced with the potentially indefinite detention of undocumented aliens."[123] Such a decision would require the acknowledgment that the original humanitarian goals of *Mezei*, *Nishimura Ekiu*, and other cases are no longer achieved by the current immigration and detention regime, which could never have been contemplated in the 1800s.

Mezei and the current case law on entry fiction fall into the same racist trap as the decision upholding Japanese internment camps in *Korematsu v. United States*.[124] The Supreme Court in that case ruled that detaining Japanese people in concentration camps during the Second World War was a "military necessity"

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119. Interview with Meyer-Thompson, *supra* note 115.

120. 8 C.F.R. § 214.14.

121. Interview with Meyer-Thompson, *supra* note 115.

122. *Id.*; *see also No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases*, S. POVERTY L. CTR. 5 (2018), https://www.splcenter.org/20181003/no-end-sight?gad_source=1&gclid=Cj0KCQjwlN6wBhCcARIsAKZvD5hVwi8vqRQTZIXGanHFk6FwMCrOmYm0V5K0eo5VWrPWrEghyREu9zEaAmcmEALw_wcB [https://perma.cc/T8TY-P4UW] ("[Detained immigrants] may be held on civil immigration charges for months, even years, before their cases are resolved.").

123. Allison Wexler, Note, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-*Zadvydas, 25 CARDOZO L. REV. 2029, 2077 (2004).

124. 323 U.S. 214 (1944).

not based on race.[125] It took seventy-four years for the Supreme Court to acknowledge that that decision was wrong, although it never explicitly overruled it. "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful . . . . But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission."[126]

There can be little argument that today's immigration detention centers largely detain Hispanic people from Central America—up to 89% of the centers' populations are from El Salvador, Guatemala, Honduras, or Mexico.[127] If the Court in *Trump v. Hawaii* can acknowledge that locking U.S. citizens away based on race is unlawful, then there is no plausible explanation for why that would not also be the case for non-citizens. This is particularly true given that most federal courts, as well as the federal government itself, acknowledge that non-citizen detainees are entitled to at least some Due Process rights.[128]

The echoes of *Korematsu*'s concentration camps are still heard today. In Minnesota and in many other states across the nation, non-admitted citizens trapped within the entry fiction doctrine are held in normal pre-trial criminal facilities contracted out from Immigration and Customs Enforcement (ICE).[129] The fact that they are scattered across the state makes it particularly difficult for attorneys to visit them to provide legal services.[130] The conditions inside both the pre-trial facilities and other centralized ICE detention centers are dire. There were 47,145 legal grievances reported to ICE in 2015 alone, 66% of which were related to a lack of access to counsel and/or case

125. *Id.* at 223.

126. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). *Cf. id.* at 2448 (Sotomayor, J., dissenting) ("Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as 'gravely wrong the day it was decided.'" (citing Korematsu v. United States, 323 U.S. 214 (1944)).

127. Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, AM. IMMIGR. COUNCIL 2 (Dec. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [https://perma.cc/PC3P-9SNN].

128. *See*, *e.g.*, Plyler v. Doe, 457 U.S. 202, 212 (1982) (stating that provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction").

129. Interview with Meyer-Thompson, *supra* note 115.

130. *Id.*

information.[131] Immigration detention centers are markedly worse than the mission houses non-admitted people were brought to in the nineteenth century as in *Nishimura Ekiu v. United States*, which provided food, clothing, transportation, and social services.[132] An ICE detention center provides no such services.

In a grotesque irony, the Minnesota Federal Immigration Court is located in Fort Snelling, Minnesota.[133] Fort Snelling has a bloody and shameful history, where thousands of non-combatant members of the Dakota Tribe were held in a concentration camp from 1862 to 1863.[134] Hundreds of people died, and many more were subjected to a "campaign calculated to make them stop being Dakota."[135] The parallels between the miseries inflicted there and the ones currently inflicted on people detained in immigration limbo are obvious and devastating. Unfortunately, the United States government does not appear to have learned from their previous humanitarian crimes.

In the alternative, if the Supreme Court does not wish to overrule precedent,[136] it need only turn to the written construction of the Constitution itself. Under the principles of statutory interpretation, one has a plausible argument that the words "the People" are written purposefully broadly.[137] The Bill of Rights and Constitution do not say that protections are delimited to

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131. Ryo & Peacock, *supra* note 127, at 26.

132. Lee, *supra* note 33, at 588 (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

133. Interview with Meyer-Thompson, *supra* note 115.

134. *The U.S.-Dakota War of 1862*, MINN. HIS. SOC'Y (2024), https://www.mnhs.org/fortsnelling/learn/us-dakota-war#:~:text=While%20imprisoned%2C%20Sakpedan%20supposedly%20heard,the%20chain%20'look%20at%20this [https://perma.cc/KBH6-YZCD].

135. *Id.*

136. Given recent decisions such as *Dobbs v. Jackson*, 597 U.S. 215 (2022), the current Court does not seem particularly persuaded by the concept of *stare decisis*.

137. U.S. CONST. amend. XIV. Compare the first clause of Section I, which speaks broadly of "citizens," to the third clause in the same sentence, which refers to "people." *Compare id.* § I ("No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States . . . ."), *with id.* ("No State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added).

citizens.[138] The Court has already taken steps in that direction. *Boumediene v. Bush* explicitly states that the basic right of habeas corpus to challenge illegal detentions extends even to non-citizens on foreign territory.[139] If the Constitution's reach is so broad as to encompass non-citizens detained on foreign soil at Guantánamo Bay, then there is no plausible explanation as to why the Constitution should not apply to people standing firmly within American territorial borders.

If the Court is worried about painting with too broad a brush, it need only remember that lawsuits can only be brought if a court has jurisdiction. A suit may be brought where the defendant resides or where the claim arose insofar as personal jurisdiction is established.[140] If the Court were to adopt a broad construction of constitutional rights, it could allow for lawsuits to be brought against American defendants (aka the federal government) in cases where those rights were violated, particularly if the basis of the claim occurred on American territory. *Martinez-Agüero* is a prime example of how this concept could be applied. The plaintiff brought a *Bivens* action against González in his role as an agent of the federal government alleging false arrest and excessive use of force under the Fourth and Fifth Amendments.[141] Once the *Martinez-Agüero* Court was able to establish that the Fourth and Fifth Amendments did indeed apply to her, they were then able to evaluate whether her claims would survive summary judgment under *Bivens v. Six Unknown Named Agents*.[142] The Fifth Circuit's approach to the issue is squarely in line with the Supreme Court precedent established in *Verdugo-Urquidez*. The *Verdugo-Urquidez* Court held that the Fourth Amendment did not stretch so far as to allow suppression in an American criminal case of a search and seizure ordered and conducted in another country.[143] The outcome of *Verdugo-*

138. It's worth noting that Black people were not considered full citizens until the ratification of the Fourteenth Amendment in 1868. *See generally* U.S. CONST. amend. XIV.

139. 553 U.S. 723 (2008).

140. *See* 28 U.S.C. §§ 1441–55 (federal general jurisdiction statute).

141. Martinez-Agüero v. González, 459 F.3d 618, 621 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006). Under *Bivens*, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971).

142. *Martinez-Agüero*, 459 F.3d at 618 .

143. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990).

Urquidez would be—and should be—different if that search had occurred at the petitioner's home within the United States. Within the territorial United States, all constitutional protections should apply.

Even in immigration proceedings that do not involve criminal charges, such as Almeida-Amaral's,[144] the Department of Homeland Security is a party and the proceeding concerns conduct—illegal entry—that occurs within the American territorial boundaries. Those facts should be sufficient to confer constitutional rights during those proceedings. If the Court wanted to take overruling *Mezei* a step further, it could also overrule *Lopez-Mendoza*, which originally held that Fourth Amendment violations do not justify suppression in civil deportation proceedings.[145] One step short of that would be to amend the standard for a showing of an "egregious violation" down to a less exacting standard, such as a showing that it is "more likely than not that a violation occurred and would affect the outcome."[146]

CONCLUSION

Regardless of the solution that the Supreme Court may ultimately take, the current immigration system, particularly as it pertains to the entry fiction doctrine, is convoluted, inefficient, and largely unworkable for most practitioners. The Court has held in *Jennings* that there is no upper bound on indefinite detention of unadmitted people.[147] That relegates thousands of

144. *See supra* notes 71–76 and accompanying text.

145. Immigration & Naturalization Servs. v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984). Some scholars argue that *Verdugo-Urquidez* "awkwardly" overruled *Lopez-Mendoza* because the *Verdugo-Urquidez* Court said "[t]he statements in *Lopez-Mendoza* should not be considered 'dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us.'" *See* Ruth Wedgwood, United States v. Verdugo-Urquidez, AMER. J. INT'L L. 747 n.31 (1990) (citing *Verdugo-Urquidez*, 494 U.S. at 272). However, there are several important distinguishing characteristics between the two cases. *Lopez-Mendoza* involved the application of the Fourth Amendment to a search as litigated during a criminal jury trial, and *Verdugo-Urquidez* concerned the application of the Fourth Amendment to a statement used during civil deportation proceedings. Due to the disparate proceedings at issue in the two cases, *Verdugo-Urquidez* should not overrule *Lopez-Mendoza*.

146. *Lopez-Mendoza*, 468 U.S. at 1046.

147. Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("Both [admitted and non-admitted alien statutory] provisions mandate detention until a certain point and authorize release prior to that point only under limited circumstances.

non-citizens to detention centers that they have little hope of being released from within a reasonable time period, if at all. Not only does the entry fiction doctrine prop up the civil detention system within the territorial United States, but it also renders it largely impossible for unadmitted non-citizens to reap the protections of the Constitution in any meaningful way. This enables federal agents to render inhumane treatment without any form of check or balance. Martinez-Agüero was exceptionally lucky that the Fifth Circuit found in her favor to allow her to pursue a *Bivens* action against the Border Patrol agent who caused her immeasurable suffering.[148] But many other non-citizens are not so fortunate.

To remedy these injustices, the Supreme Court should confront the concept of entry fiction directly. Overturning *Mezei* would put the Court squarely in line with *Trump v. Hawaii* by acknowledging that detaining people of a specific race—largely if not solely because of their race, ethnicity, or national origin—is in contravention of the Constitution.[149] As Justice Breyer spends ample time explaining in his dissent to *Jennings*, English common law and Founding-era congressional statutes are clear about the expansion of constitutional protections to non-citizens.[150] Explicitly overruling *Lopez-Mendoza* and allowing the Fourth Amendment right against unreasonable searches and seizures to attach in *both* criminal and immigration proceedings would also be a massive step in ensuring constitutional protections in all legal cases taking place in the country. The Supreme Court resolving the circuit split and taking these clarifying steps would benefit immigration legal rights organizations across the country—such as the Immigrant Law Center of Minnesota—by removing one of the largest barriers that they face in helping their clients along pathways to naturalization and citizenship.

As a result, neither provision can reasonably be read to limit detention to six months.").

148. Martinez-Agüero v. González, 459 F.3d 618, 623 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006).

149. U.S. CONST. amend. XIV, § I ("No State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added).

150. *Jennings*, 138 S. Ct. at 864–66 (Breyer, J., dissenting).